IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

MID-AMERICA REAL ESTATE)	
COMPANY d/b/a COLDWELL BANKER)	
MID-AMERICA GROUP, REALTORS,)	
)	
Plaintiff,)	Case No. 4:04-CV-10175
)	
V.)	
)	
IOWA REALTY COMPANY, INC. and,)	ORDER
FIRST REALTY, LTD.,)	
)	
Defendant.)	

I. BACKGROUND

Plaintiff Mid-America Real Estate Company d/b/a Coldwell Banker Mid-America Group,
Realtors ("Coldwell Banker") filed its Complaint against defendants Iowa Realty Company, Inc. ("Iowa Realty") and First Realty, Ltd. ("First Realty") (together referred to as the "Iowa Realty Group") on
March 25, 2004, seeking to enjoin defendants from excluding other real-estate agents from showing
and selling homes listed by defendant Iowa Realty under its Passport Plus program.¹ In the Complaint,
Coldwell Banker alleged the following: Count I breach of contract; Count II breach of implied covenant
of Good Faith and Fair Dealing; Count III monopolization; and Count IV Attempt to Monopolize. The
matter now before the Court is Coldwell Banker's request for a preliminary injunction that would
preclude Iowa Realty Group from taking such action during the pendency of the lawsuit.

¹ Coldwell Banker initially sought a temporary restraining order ("TRO") until the Court could rule on its request for a preliminary injunction. The parties then agreed to the issuance of a stipulated TRO on March 29, 2004 until the preliminary injunction request could be resolved.

Pursuant to a stipulated temporary restraining order ("TRO") defendants are presently prohibited from: (1) failing to comply with the August 30, 2002 Co-Marketing Agreement, (2) failing to deliver their listing information to the Des Moines Area Association of Realtors' ("DMAAR") Multiple Listing Service in accordance with the Agreement executed by Iowa Realty, First Realty, Coldwell Banker, and the Des Moines Area Association of Realtors, (3) signing exclusive listing contracts with, and offering exclusive listing contracts to, clients pursuant to the Passport Plus program, (4) refusing to split commissions with Coldwell in accordance with the parties' established course of dealing, (5) advertising the Passport Plus program, and (6) otherwise implementing the Passport Plus program. Subsequent to the issuance of the TRO, the parties engaged in discovery, exchanged documents, and took depositions.

Defendants resisted plaintiff's motion for a preliminary injunction on April 14, 2004 and plaintiff filed its response on the same day. This Court held a preliminary injunction hearing on April 15-16, 2004. Both parties submitted additional filings to the Court on April 30, 2004. The motion for preliminary injunction is now fully submitted.

II. FINDINGS OF FACT

A. Parties

Plaintiff Coldwell Banker is a licensed full-service real-estate brokerage firm in the greater Des Moines area. Coldwell Banker is owned by Mid-America Group, Ltd. The president of Coldwell Banker is Carolyn Helmlinger.

Defendant Iowa Realty is a licensed full-service real-estate brokerage firm in the greater Des

Moines area. Iowa Realty is owned by Home Services of America, Inc. The president of Iowa Realty is Michael Knapp.

Defendant First Realty is a licensed full-service real-estate brokerage firm in the greater Des Moines area. First Realty is a wholly-owned subsidiary of Iowa Realty. First Realty is a separately-licensed broker distinct from Iowa Realty. Michael Knapp is also the president of First Realty.

B. Des Moines Real Estate Market

The relevant geographic market for purposes of the present dispute consists of the greater Des Moines area, essentially Warren, Dallas and Polk counties. The Co-Marketing Agreement refers to the "Des Moines metropolitan market" in Section I.A.2.

C. DMAAR

All parties to this case are members of the Des Moines Area Association of Realtors ("DMAAR"). DMAAR operates a multiple listing service ("MLS") and publishes Rules and Regulations for the participation in and operation of the MLS. Those rules are implemented and enforced by the standing DMAAR MLS Committee and the DMAAR Board of Directors.

D. Multiple Listing Services

A multiple listing service is a common database where member companies submit listings to facilitate the exchange of information about one another's listings so agents can cross company lines to sell one another's houses and can show clients all houses on the market, not just those homes listed with their own company. There are two multiple listing services in the Des Moines area: Rapattoni and MLXchange. DMAAR operates the Rapattoni MLS. Rapattoni is a web-based MLS database software system. All DMAAR members except Iowa Realty, First Realty and Coldwell Banker enter

their listing information directly into the Rapattoni MLS software and view that listing information through the Rapattoni software.

Iowa Realty, First Realty and Coldwell Banker use a multiple listing service separate from Rapattoni known as MLXchange. Iowa Realty has the exclusive license in the Des Moines area realestate market for the MLXchange software. Coldwell Banker has access to MLXchange pursuant to the 2002 Co-Marketing Agreement detailed below. All home listings from Iowa Realty, First Realty and Coldwell Banker are listed on MLXchange and each day this information is shared with the DMAAR Rapattoni system and vice versa. Consequently, other DMAAR members have access to MLXchange listing data through Rapattoni and Coldwell Banker, Iowa Realty, and First Realty have access to Rapattoni listings through MLXchange.

E. Co-Marketing Agreement

In early 2002, Coldwell Banker approached Interealty, the owner of the MLXchange software, to purchase a license and was informed that Iowa Realty has the exclusive license for MLXchange in the Des Moines area. Consequently, in the summer of 2002, Coldwell Banker approached Michael Knapp, President of Iowa Realty, about the possibility of sublicensing the MLXchange software. Ms. Helmlinger of Coldwell Banker was told that Iowa Realty would grant a sublicense of the MLXchange software for a fee but only on the condition that Coldwell Banker also participate and help fund a saturated mass marketing ("SMM") mailer (known as Des Moines Ads at Home) that would contain 16 pages of advertisements for residential homes listed by Iowa Realty, First Realty and Coldwell Banker.

On August 30, 2002, the parties signed the Co-Marketing Agreement. In Section I.A.1 of the

Co-Marketing Agreement, Iowa Realty grants Coldwell Banker a non-exclusive license to use the MLXchange software. Section I.A1 provides:

Iowa Realty grants to Coldwell a non-exclusive sub-license to use the MLXchange software all as further set forth in this Agreement. The MLXchange software shall include the MLXchange system (real estate listing information management system), Passport Plus program (distribute desktop software designed to function as an offline listing database), Designer Tool (report creation tool), Datalink (data and photo download tool), Photolink (photo upload tool), (all hereinafter collectively referred to as 'the MLXchange Software')

The Iowa Realty Group also granted Coldwell Banker a nonexclusive license to use all the listing information on MLXchange. Section I.A.2 of the Co-Marketing Agreement provides:

Subject to the restrictions set forth in Section I(C)(1) Restrictions on Use-Coldwell, Iowa Realty Group hereby grants to Coldwell a non-exclusive license to use the listing information, including listings, sales, pending/closed sales, expirations and modifications thereto related to residential real estate located in the Des Moines metropolitan market ('Listings and Listing Information') that Iowa Realty Group shall enter into the MLXchange Software ("Iowa Realty Group Listings and Listing Information").

In reciprocation, Coldwell Banker granted the Iowa Realty Group a nonexclusive license to use all its listings information on MLXchange in section I.A.3.

The Co-Marketing Agreement also contains a termination clause, VII.C., which provides in part:

<u>Termination without Cause</u>. In the event either party desires to cancel this Agreement for any reason other than provided under Section VII(B) prior to the expiration of the term of this Agreement, either party may provide to the other, a written notice delivered at least twelve (12) months prior to the desired cancellation date . . .The MLX change Software and the SMM program will continue to be made available to Coldwell during any such twelve (12) month notice cancellation period; however, upon the

expiration of such twelve (12) month notice period, all licenses, sublicenses, and any services previously made available to Coldwell will cease.

Plaintiff's Appendix II, PX1 at 10.

F. Passport Plus Program

In an attempt to bolster its share of the Des Moines real estate market Iowa Realty developed and had originally planned on implementing its Passport Plus program in the early spring of 2004. The program's implementation, as previously mentioned, was delayed pursuant to the parties stipulated TRO until the resolution of Coldwell Banker's preliminary injunction request.

The Passport Plus program was designed to be exclusive to the Iowa Realty Group. The complete listing information for homes listed in this program will only be available to Iowa Realty and First Realty agents and there is no commission sharing with non-Iowa Realty Group agents. Passport Plus program homes may only be shown by Iowa Realty agents and all buyers must be represented by a First Realty or Iowa Realty agent. The program offers home sellers the choice to enter into an exclusive listing agreement with Iowa Realty in return for several incentives. As incentives to sign up for the Passport Plus program, Iowa Realty will offer prominent advertising for Passport Plus listings, a one-year home warranty on the property, financing incentives through Iowa Realty's mortgage company, a free appraisal and a quarter percent discount or reduction in the cost of the loan origination fees through the mortgage company, and abstract updating immediately upon listing of the home.

III. APPLICABLE LAW AND ANALYSIS

Coldwell Banker now requests that this Court grant a preliminary injunction enjoining Iowa

Realty from implementing its Passport Plus program. The granting of a preliminary injunction is an extraordinary remedy that will not issue unless the right to such relief is clearly established by the movant. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). In evaluating a motion for preliminary injunction, the Court must consider: (A) the threat of irreparable harm to the moving party; (B) the balance of hardships should the injunction issue; (C) the probability that the moving party will succeed on the merits; and (D) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). No single factor is dispositive, and the Eighth Circuit favors a flexible approach. *Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d 500, 503 (8th Cir. 1987).

A. Irreparable Harm

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Generally, irreparable harm is suffered when monetary damages are difficult to ascertain or are inadequate. *See Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 386 (7th Cir. 1984) (preliminary injunction may be granted upon a showing that an award of damages will be inadequate). When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong may be satisfied. *See United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir.2002) ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury.").

In the present case, Coldwell Banker argues that it faces immediate and irreparable harm from Iowa Realty's Passport Plus program that cannot be later compensated fully by monetary damages.

Coldwell Banker contends that it will sustain lost customers, lost agents, lost reputation, and lost goodwill if the preliminary injunction is not granted. Ms. Helmlinger, Coldwell Banker's President, testified that Coldwell Banker's "reputation would be damaged because [Coldwell] could no longer show [potential clients] a hundred percent of the market," resulting in the loss of customers. Transcript at 111:15-25. Potential clients of Coldwell Banker will have a strong incentive to use Iowa Realty or First Realty, because they will be the only agents that can show all homes in the MLXchange database.² Ms. Helmlinger also testified that if the preliminary injunction is not granted, she expects Coldwell Banker agents to leave the company and go to work for Iowa Realty or First Realty so they can show clients all of the listings in the Des Moines area market. Transcript at 179:16-20.

Iowa Realty Group, on the other hand, contends that any harm to Coldwell is wholly speculative and any future harm could be fully compensated by an award of money damages. This Court disagrees. There is little doubt that Coldwell Banker's inability to continue to show all of the homes listed by Iowa Realty will adversely affect Coldwell Banker's business and will likely result in a significant loss of agents. While Ms. Helmlinger admitted that it may be possible to calculate some elements of Coldwell Banker's economic loss incurred as a result of Passport Plus, "[h]arm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars." *Medicine Shoppe Intern., Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003). Harm to Coldwell Banker's

² The Court notes that because of the presence of office exclusive listings and for-sale-by-owner homes, no real estate agents have the ability to show *all* homes in the Des Moines area market. Nevertheless, the homes listed in the MLXchange database comprise a substantial portion – approximately 85 percent – of the Des Moines area market. Transcript at 58:4-7 (DMAAR sales represent 85 percent of the Des Moines area market).

reputation and goodwill has the potential to be especially damaging in this case, where the parties' business practices and marketing campaigns have been developed with the understanding that the parties will be able to access each others' listings. The one year termination clause contained in the Co-Marketing Agreement was an obvious acknowledgment that a material change by one party under the agreement would require a significant time period to explore alternative marketing strategies by the other party. The Court therefore finds this factor weighs in favor of granting preliminary injunctive relief.

B. Balance of Hardships

As detailed more fully above, Coldwell Banker has indicated that it will be adversely affected if its motion for a preliminary injunction is denied and Iowa Realty were to implement the Passport Plus program. Conversely, Iowa Realty Group has presented little evidence that it would be harmed by a decision of the Court granting an injunction maintaining the status quo. Iowa Realty Group contends only that the issuance of a preliminary injunction will impede Iowa Realty's ability to respond to increasing competitive pressure in the marketplace. This concern does not outweigh the aforementioned consequences that the Passport Plus program could have on Coldwell Banker's business. Under these circumstances, the balance of harms tips in favor of granting preliminary injunctive relief.

C. Likelihood of Success on the Merits

1. Count I: Breach of Contract

Coldwell Banker alleges that Iowa Realty's use of the Passport Plus program will breach several provisions of the Co-Marketing Agreement. The most relevant provisions of the Co-Marketing Agreement are set forth below. Section I.A.1 provides in part:

MLXchange and Related Software. Iowa Realty grants to Coldwell a non-exclusive sub-license to use the MLXchange software all as further set forth in this Agreement. The MLXchange software shall include the MLXchange system (real estate listing information management system), Passport Plus program (distribute desktop software designed to function as an offline listing database), Designer Tool (report creation tool), Datalink (data and photo download tool), Photolink (photo upload tool), (all hereinafter collectively referred to as 'the MLXchange Software').

Plaintiff's Appendix II, PX1 at 1. Section I.A.2 provides:

<u>Iowa Realty Group Listing and Listing Information</u>. Subject to the restrictions set forth in Section I(C)(1) <u>Restrictions on Use-Coldwell</u>, Iowa Realty Group hereby grants to Coldwell a non-exclusive license to use the listing information, including listings, sales, pending/closed sales, expirations and modifications thereto related to residential real estate located in the Des Moines metropolitan market ('Listings and Listing Information') that Iowa Realty Group shall enter into the MLXchange Software ('Iowa Realty Group Listings and Listing Information').

Plaintiff's Appendix II, PX1 at 1-2. Section I.B.2 provides, in part: "Coldwell users will have access to all application data on MLXchange." Plaintiff's Appendix II, PX1 at 3.

Coldwell Banker contends that the Co-Marketing Agreement requires Iowa Realty to share all of the information that it enters into the MLXchange. At the hearing, Mr. Knapp admitted that Passport Plus listings would be entered into the MLXchange, but that they would be entered in such a way that Coldwell Banker would not be able to see the information. Transcript at 355:19-22, 360:21-23, 362:11-13. Coldwell Banker argues that by barring them from seeing or using the Passport Plus listings in the MLXchange database, Iowa Realty Group is denying them "access to all application data in MLXchange," section I.B.2, for the "purpose of assisting Coldwell clients . . . interested in listing, selling, or buying residential real estate . . . or for developing comparative market analyses . . . [or for] conducting residential real estate appraisals," section I.C.1, in breach of sections I.A.2, I.B.2, I.C.1

and I.C.2.

Iowa Realty Group argues that the Co-Marketing Agreement does not require Iowa Realty to make available their office exclusive listings.³ Iowa Realty Group notes that there is no language in the Co-Marketing Agreement that addresses the sharing of office exclusive listing information. The parties negotiated and entered into the Co-Marketing Agreement against a backdrop of industry standards providing that office exclusive listing information shall not be disseminated to MLS members while the listing is pending. Section 1.1(a) of the Rules and Regulations of the MLS of the Bylaws of the DMAAR, Defendants' Appendix, Exhibit D at D.023. Iowa Realty Group contends that under these circumstances, the parties did not intend the Co-Marketing Agreement to create any obligation to each other with respect to information sharing for office exclusive listing agreements. *See People's Bank & Trust Co. v. Lala*, 392 N.W.2d 179, 184 (Iowa Ct. App. 1986) (the court should "absolutely never give effect to the meaning of words that neither party in fact gave them.").

As a general rule, a "contract will be strictly construed if its words are clear and unambiguous."

³ The parties disagree as to whether Iowa Realty's Passport Plus homes are properly classified as office exclusive listings. An office exclusive listing is one in which a customer directs his or her broker to market the seller's property only to those brokers and agents the customer specifically authorizes. Transcript at 170:24-172:1. Coldwell Banker makes several arguments that Iowa Realty's Passport Plus listings are not truly office exclusive. Essentially, Coldwell Banker contends that the Passport Plus homes cannot be "office exclusive" because Iowa Realty shares the listing information with First Realty and thus does not keep the listings exclusive to its office. The Court finds this argument unpersuasive. As noted above, a realtor will list a property as an office exclusive when "it is the desire of the seller that a listing not be filed with the [MLS]." Handbook on Multiple Listing Policy of the National Association of Realtors, Plaintiff's Appendix II, PX245 at 6-6. It appears under the guidelines that Iowa Realty may share the listing with any other realtor, as long as it is authorized by and is the "desire of" the seller. In the present case, sellers who sign up for the Passport Plus program authorize Iowa Realty and its subsidiaries – i.e. First Realty – to market office exclusive listings. Defendants' Appendix, Exhibit G at G.021.

SDG Macerich Props., L.P. v. Stanek, Inc., 648 N.W.2d 581, 586 (Iowa 2002). Under the Co-Marketing Agreement, Iowa Realty expressly gave Coldwell Banker the right to "all application data on MLXchange." Plaintiff's Appendix II, PX1 at 3. The fact that the Passport Plus program homes may be classified as office exclusive listings does not create ambiguity in the Co-Marketing Agreement, nor does it require Iowa Realty to choose between violating its commitment to its office exclusive clients or breaching the Co-Marketing Agreement. If a client of Iowa Realty desires an office exclusive listing, Iowa Realty should honor that request by simply not putting the listing in the MLXchange where, under the Co-Marketing Agreement, other realtors have full access to it. It is for the aforementioned reasons that this Court finds the record sufficient to support a finding that Iowa Realty Group would breach the Co-Marketing Agreement by denying Coldwell Banker access to information about Passport Plus homes listed on MLXchange. Accordingly, the Court finds Coldwell Banker likely to succeed on the merits of its breach of contract claims.

2. Count II: Implied Covenant of Good Faith and Fair Dealing

Coldwell Banker also argues that by refusing to share commissions, in contradiction to decades of reciprocity and cooperation, Iowa Realty Group is violating its duty of good faith and fair dealing.

Coldwell Banker contends Iowa Realty has shared commissions for over thirty years with other brokers and that the continued cooperation among brokers is part of the essential purpose of the Co-Marketing Agreement. Transcript at 350:4-10.

The Supreme Court of Iowa has adopted the Restatement (Second) of Contracts § 205 (1981), which imposes a duty of good faith and fair dealing in the performance and enforcement of a contract. *See Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990). Encompassed within this duty

is an obligation not to do anything "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Pittman v. Blackhawk Rock & Gravel, Inc.*, 1999 WL 823544, *2 (Iowa Ct. App. Oct. 15, 1999) (quoting 17A Am.Jur.2d Contracts § 380 (1991)).

Iowa Realty Group claims that the parties did not intend the Co-Marketing Agreement to regulate its obligations with respect to commission sharing or sharing of office exclusive listings.

Furthermore, Iowa Realty Group argues that a finding that the Passport Plus program would violate the implied covenant of good faith and fair dealing would essentially impose unbargained for obligations upon the parties. This Court disagrees.

As Coldwell Banker points out, Mr. Knapp admitted that the purpose of Section I.C.1 of the Co-Marketing Agreement is to let Coldwell Banker and Iowa Realty Group use each other's data for the purpose of listing, selling, buying residential real estate, and doing comparables and appraisals.

Transcript at 365:5-16. The Court notes that the effect of Iowa Realty's decision to actively solicit office exclusive listings would be to limit Coldwell Banker's access to many of Iowa Realty Group's listings. Iowa Realty Group has not contested Coldwell Banker's contention that office exclusive listings have traditionally been used in situations where the seller has personal reasons for not wanting the fact known that the property was being offered for sale. *See* Handbook on Multiple Listing Policy of the National Association of Realtors, Plaintiff's Appendix II, PX245 at 6-6; Transcript at 68:20-24, 204:16-22. Thus, it appears that the active solicitation of office exclusive listings is contrary to the parties' established course of dealing under the Co-Marketing Agreement. By limiting the open exchange of listing information between the parties, Iowa Realty Group restricts an essential purpose of the Co-Marketing Agreement, thereby breaching the implied covenant of good faith and fair dealing.

Thus, the Court finds that as long as the Co-Marketing Agreement remains in effect, implementation of the Passport Plus program would deny Coldwell Banker its rights to the "fruits of the contract."

Assuming, however, that Iowa Realty Group had properly terminated the Co-Marketing Agreement, there would be nothing in this doctrine that would prevent Iowa Realty Group from trying to increase its share of the market by soliciting office exclusive listings. Prior to the Co-Marketing Agreement the parties had been operating for years in a market that included office exclusive listings, albeit a small number. Plaintiff's Proposed Findings of Fact at 10 ("At most, Iowa Realty executed 9 office exclusive sales in 2003."). The presence of these office exclusive listings must be taken into account when considering the parties course of dealings. While Iowa Realty's decision to advertise its ability to take office exclusive listings with the Passport Plus program may be a departure from past practices, aside from the implied duty of good faith and fair dealing created by the Co-Marketing Agreement, nothing would prevent Iowa Realty Group from attempting to increase its share of the Des Moines area real estate market by soliciting office exclusive listings. Under these circumstances, Iowa Realty Group's acceptance of office exclusive listings would not violate the implied covenant of good faith and fair dealing any more than when it executed a limited number of office exclusive sales in the past.

For the aforementioned reasons, the Court finds that as long as the Co-Marketing Agreement remains in effect, Coldwell Banker is likely to succeed on the merits of its claim for breach of implied covenants of good faith and fair dealing.

3. Count III: Monopolization

Coldwell Banker alleges that Iowa Realty Group's Passport Plus program will effectively create

a monopoly in the Des Moines area real estate market in the in violation of § 2 of the Sherman Act.

Section 2 of the Sherman Act provides that it is unlawful to: "... monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states" 15 U.S.C. Section 2. Two basic elements must exist to establish a case under section 2 of the Sherman Act: (a) possession of monopoly power in the relevant market; and (b) the willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 695-96 (8th Cir. 1984), *cert. denied*, 469 U.S. 872 (1984).

a. Monopoly Power

In *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956), the Supreme Court defined monopoly power as "the power to control prices or exclude competition." There are two ways of proving market power. The first is by defining the relevant market in geographic and product terms and by showing that the defendant's share exceeds a reasonable threshold under the circumstances. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The second is through direct evidence of anti-competitive effects. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.").

(1) Relevant market and market share

The parties have stipulated that the relevant geographical market is the greater Des Moines area. The relevant product market must be defined so as to capture the competitive realities of the market place – the "area of effective competition." *United States v. E. I. du Pont De Nemours II*, 353 U.S. 586, 593 (1957). In defining the product market, courts consider "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 70 n.8 (2nd Cir.1984).

Coldwell Banker contends that the relevant product market is residential real estate brokerage services, which does not include flat-fee brokers or for-sale-by-owner homes. The Court disagrees.⁴ Coldwell Banker's proposed definition of the product market places undue emphasis on the differences between the product offered by a full-service broker, and a flat fee or for-sale-by-owner home. Full-service brokers are clearly in competition with flat-fee brokers and a persuasive argument can be made that they are also competing with for-sale-by-owner homes. While full-service brokers may offer additional services, in each case the fundamental purpose is the marketing and sale of a residential home.

Given the Court's aforementioned determination of the relevant product market, Iowa Realty

⁴ The Court disagrees for the purposes of this motion only. At later stages in this litigation it may be necessary for the parties to revisit both the issue of whether for-sale-by-owner and flat-fee broker homes should be included in the relevant product market and whether Iowa Realty's market share should be considered separately or combined with First Realty.

Group represents an approximately 50 percent share of the Des Moines area real estate market.⁵ Courts have generally found that a 50 to 60 percent market share is insufficient to create a monopoly. See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Company of America, 885 F.2d 683 (10th Cir. 1989) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%.", citing 2 E. Kintner, Federal Antitrust Law § 12.6 (1980)); see also Areeda & Turner, Antitrust Law, ¶ 518.3c ("There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute a monopoly."); but see Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69 n.7 (2nd Cir. 1984) ("a party may have monopoly power in a particular market, even though its market share is less than 50%."). Even assuming 50 to 60 percent was sufficient, however, evidence of market share alone is not conclusive as to whether monopoly power exists because market share "may not reflect actual power to control price or exclude competition." Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 967 (10th Cir. 1990); see also Broadway Delivery Corp. v. United Parcel Serv. of America, 651 F.2d 122, 128 (2nd Cir. 1981) ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence.").

⁵ The parties did not provide data showing Iowa Realty Group's share of the entire relevant product market. However, in 2003 DMAAR sales accounted for approximately 85 percent of the Des Moines area real estate market, Transcript at 58:4-7, and Iowa Realty Group had an approximately 60 percent share of DMAAR sales, Plaintiff's Appendix II, PX64 at IR01436.

Even assuming the relevant product market did not include for-sale-by-owner homes, Iowa Realty Group would only have an approximately 60 percent share of the market. *See generally* Transcript at 57:22-58:3 (flat-fee brokers represented approximately 2 to 3 percent of the Des Moines area real estate market in 2002), Transcript at 58:4-7, Plaintiff's Appendix II, PX64 at IR01436.

Because Iowa Realty Group does not have a materially significant market share – only controlling approximately 50 percent – the Court will not infer that Iowa Realty Group has monopoly power unless there is a direct evidence that they have actual power to control price or exclude competition. *See Tops Maekets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2nd Cir. 1998) (holding that despite evidence of 72 percent market share, consideration of other relevant factors did not support a finding of monopoly power); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (finding that mere showing of substantial or even dominant market share alone cannot prove monopoly power; plaintiff must show that dominant firm can control price or exclude competition); *Nat'l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985) (holding that 100 percent market share fails to prove monopoly power where dominant firm had not power to control price).

(2) Direct evidence of monopoly power

Coldwell Banker alleges that Iowa Realty Group has caused sustained adverse effects on competition by maintaining supracompetitive prices, has excluded competition by forcing adverse commission splits on other realtors, and has coerced Coldwell Banker into buying advertising under the Co-Marketing Agreement. If true, these actions would be indicative of monopoly power; however, the record currently before the Court is insufficient to support Coldwell Banker's allegations.

There is nothing in the record suggesting that Iowa Realty Group has the power to control prices in the Des Moines area market. In fact, Coldwell Banker's own expert indicated that Iowa Realty cannot control prices. Transcript at 257:7-15. There is also insufficient evidence in the record showing that Iowa Realty Group has the power to exclude competition from the market. Coldwell

Banker's allegation that Iowa Realty Group imposed adverse commission splits against RE/MAX is unpersuasive in that it only addresses harm to a specific competitor and not to competition generally. *See Los Angeles Land Co.*, 6 F.3d 1422, 1426-27 (9th Cir. 1993); *Davies v. Genesis Medical Center*, 994 F.Supp. 1078, 1097 (S.D. Iowa 1998). Moreover, it appears that the market has sustained a significant number of real estate businesses, Transcript at 135:19-136:1, while Iowa Realty Group's share of the market has decreased over the last several years, *see* Iowa Realty and First Realty Share of Completed MLS Transactions for 1996-2003, Defendant's Exhibit DDD. For the aforementioned reasons, the Court finds that there is no convincing direct evidence in the present record that Iowa Realty Group has monopoly power.

b. Willful Acquisition or Maintenance of Monopoly Power

As detailed above, Coldwell Banker was required to show both that Iowa Realty Group has monopoly power and that it willfully utilized that power. The Court found the record insufficient to support of finding that Iowa Realty Group has monopoly power. Consequently, the Court need not determine whether Iowa Realty Group willfully acquired or maintained monopoly power. *See National Reporting Co. v. Alderson Reporting Co., Inc.*, 763 F.2d 1020 (8th Cir. 1985) (company may not be found guilty of completed monopolization in violation of the Sherman Anti-Trust Act § 2 without proof of actually attaining market dominance or monopoly power). The Court finds Coldwell Banker unlikely to succeed on the merits of its monopolization claim.

4. Count IV: Attempted Monopolization

Coldwell Banker also claims that Iowa Realty Group's implementation of the Passport Plus program is an attempt to monopolize in violation of § 2 of the Sherman Act. A claim of attempted

monopolization requires Coldwell Banker to prove that Iowa Realty Group: "(1) specifically intended to control prices or destroy competition in some part of commerce; (2) engaged in predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (2) a dangerous probability of success." *H.J., Inc. v. Int'l Tel. & Telegraph Corp.*, 867 F.2d 1531, 1540-41 (8th Cir. 1989).

a. Specific intent to control prices or eliminate competition

As indicated above, the Court has already concluded that it is unlikely that Coldwell Banker will be able to prove that Iowa Realty Group has the ability to control prices or eliminate competition. Similarly, Coldwell Banker has not provided sufficient evidence in the record to support a finding that Iowa Realty Group implemented the Passport Plus program with the specific intent to control prices or eliminate competition from the market. Instead of attempting to create a monopoly, it appears that Iowa Realty Group was simply trying to reverse its recent trend of losing market share. *See* Iowa Realty and First Realty Share of Completed MLS Transactions for 1996-2003, Defendant's Exhibit DDD.

Because the Court has found insufficient evidence to support a finding of Iowa Realty Group's specific intent, the Court need not consider the remaining two factors for determining attempted monopoly. Based on the current record, the Court finds that Coldwell Banker is not likely to succeed on its attempted monopolization claim.

5. Conclusion: Likelihood of Success on the Merits

As detailed above, the Court found that Coldwell Banker is likely to succeed on its contract claims (Counts I and II), but that the record is insufficient to support a finding that Coldwell Banker is likely to succeed on its monopolization claims (Counts III and IV). Nevertheless, because Coldwell

Banker is likely to succeed on its breach of contract claims this factor weighs in favor of granting preliminary relief on a limited basis.

D. Public Interest

Finally, the Court must consider whether the issuance of a preliminary injunction serves the public interest. The parties disagree as to whether implementation of the Passport Plus program will increase or decrease consumer choice. Iowa Realty Group argues that Passport Plus provides home sellers with additional choices regarding the listing and selling of their homes. Conversely, Coldwell Banker contends that if the Passport Plus program is enacted, buyers will no longer be able to select a realtor of their choice if they choose to purchase a Passport listed home. Coldwell Bankers also asserts that because buyers and sellers not represented by Iowa Realty Group will not have access to listing information, they will be unable to price homes competitively and do comparisons in the market.

As the Court has indicated above, the ability of the consumer to choose an office exclusive listing has been around long before the Passport Plus program. The success of Iowa Realty's promotion of office exclusive listings ultimately will be driven by the consumer. Despite the fact that Iowa Realty may advertise its Passport Plus program, it will be up to the seller of the home to decide whether an office or MLS listing is preferable. Under these circumstances, Coldwell Banker has the burden to present sufficient evidence to convince the Court that Iowa Realty Group's solicitation of office exclusive listings will in fact limit overall consumer choice. Coldwell Banker has not sustained its burden and the Court finds this factor neutral with regard to the Court's decision to grant preliminary injunctive relief.

IV. CONCLUSION

For the reasons outlined above and after weighing all relevant factors, IT IS HEREBY

ORDERED THAT:

- I. Pending judgment after a trial, defendants, defendants' officers, servant, employees, and attorneys and all those acting in active concert or participation with them, will refrain from:
 - A. Failing to comply with the August 30, 2002 Co-Marketing Agreement executed by defendants and plaintiff; specifically by denying plaintiff access to information listed in the MLXchange database;
 - B. Failing to deliver listings and listing information to the Des Moines Area Association of Realtors' Multiple Listing Service in accordance with the Agreement executed by defendants, plaintiff, and the Des Moines Area Association of Realtors, Inc.;
 - C. Actively offering to or soliciting exclusive listing contracts from clients pursuant to the Passport Plus program; nothing in this Order precludes defendants from entering into exclusive listing contracts in accordance with the established course of dealing between the parties;
 - D. Refusing to cooperate with plaintiff and other real-estate brokers in the greater Des Moines area in the sharing of listing information or in the showing, selling, or buying of residential real estate; and
 - E. Refusing to split commissions with plaintiff and other real-estate brokers in the greater Des Moines area in accordance with the established course of dealing.
- II. Nothing in this Order is to be interpreted to prevent defendants from offering benefits and incentive programs that are not exclusionary and that otherwise do not breach the Co-Marketing Agreement.
- III. Nothing in this Order precludes defendants from exercising its right to terminate the Co-Marketing Agreement pursuant to VII.C. If Iowa Realty Group determines that it is in its best interest to give notice and terminate the Co-Marketing Agreement in accordance with the contract, the injunction shall only remain in effect until one year after the date notice of termination is given.

IV. In conjunction with this Preliminary Injunction Order, plaintiff has filed a bond in the amount of one hundred thousand dollars (\$100,000).

The injunction will remain in effect until after the trial.⁶ However, if Iowa Realty Group determines that it is in its best interest to give notice and terminate the Co-Marketing Agreement in accordance with the contract, the injunction shall only remain in effect until one year after the date notice of termination is given.

IT IS ORDERED.

Dated this 28th day of May, 2004.

⁶ Nothing in the Court's preliminary injunction order precludes Iowa Realty Group from exercising its termination right under the Co-Marketing Agreement pursuant to VII.C.